No. 89-624

In The

Supreme Court of the United States

October Term, 1989

MAISLIN INDUSTRIES U.S., INC., et. al.,

Petitioners,

v.

PRIMARY STEEL, INC.,

Respondent.

On Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

JOINT AMICUS CURIAE BRIEF ON BEHALF OF ROBERT YAQUINTO JR., TRUSTEE FOR THE ESTATE OF CARAVAN REFRIGERATED CARGO, INC., ET. AL. IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities iii

Statutes Involved vii

Interest of the *Amici Curiae* viii

Argument 1

A. Summary of Argument 1

B. Collection of Undercharges, as Mandated by Congress, Cannot Constitute an Unreasonable Practice 3

1. Statutory Foundation 3

2. Purpose of the Act 4

3. Authority from this Court 4

4. Courts of Appeal Decisions 8

5. *Seaboard* is Consistent with *Amici Curiae* .. 9

6. *Western Pacific* Consistent with *Amici Curiae* 10

7. Other Pertinent Cases 11

C. No Unreasonable Actions Involved Where Shipper Relies on Quoted Rate 13

1. Rate Reasonableness vs. Practice Reasonableness 13

2. "Unreasonable Practices" may not be Considered 14

TABLE OF CONTENTS – Continued

Page

3. Shippers Cannot Rely on Quoted Rate ... 15
4. Reliance on Quoted Rate is Unreasonable 16
5. Case Authority Explained ... 17
6. Contrast Shippers Situation with Cases Cited ... 19
7. "Unreasonable Practices" Constitute the Exception ... 19

D. ICC has no jurisdiction to disallow collection of filed rates ... 20

1. ICC Does Not Define Its Own Jurisdiction 20
2. No Statutory Authority for Referral ... 21
3. ICC May Direct Future Practices Only ... 22
4. Intent of Congress Should Not Be Thwarted 23

Conclusion ... 24

TABLE OF AUTHORITIES

Page

COURT CASES:

A.T. & S.F. Ry. Co. v. Bouziden, 307 F.2d 230 (10th Cir. 1962) ... 23

A.T. & S.F. Ry Co. v. Robinson, 233 U.S. 172 (1914) .23, 24

Bartlett-Collins Co. v. Surinam Nav. Co., 381 F.2d 546 (10th Cir. 1967) ... 23

Bernstein Brothers Pipe and Machinery Co. v. Denver and R.G.W.R. Co., 193 F.2d 441 (10th Cir. 1951) ... 23

Buckeye Cellulose Corp. v. L & N Railroad Company, 1 I.C.C.2d 767 (1985), *Aff'd Sub. Nom. Seaboard System Railroad v. United States*, 794 F.2d 635 (11th Cir. 1986) ... 2, 9, 10, 17

Burnet v. Coronado Oil and Gas Co., 285 U.S. 393, 52 S.Ct. 443, 76 L.Ed. 815 (1932) ... 24

Carriers Traffic Service, Inc., et. al. v. Anderson, Clayton and Co., et. al., Case Numbers 88-2697, 88-2707 and 88-3053 (7th Cir. 1989) ... 18

Consolidated Freightways v. Terry Tuck, Inc., 612 F.2d 465 (9th Cir.), *cert denied*, 447 U.S. 907 (1980) ... 8

Empire Petroleum Co. v. Sinclair Pipeline Co., 282 F.2d 913 (10th Cir. 1960) ... 4, 8, 23, 24

Illinois Central Gulf Railroad Co. v. Golden Triangle Wholesale Gas Company, 586 F.2d 588 (5th Cir. 1978) ... 8

In Re Penn Central Transportation Co., 477 F.2d 841 (3d Cir.), *aff'd in part*, 414 U.S. 885, *cert. denied in part*, 414 U.S. 923 (1973) ... 15

TABLE OF AUTHORITIES – Continued

Page

Keogh v. Chi. & N.W.R. Co., 260 U.S. 156, 43 S.Ct. 47 (1922) 25

Louisville and Nashville Railroad Co. v. Central Iron and Coal Co., 265 U.S. 59, 44 S.Ct. 441, 68 L.Ed. 900 (1924) 1

Louisville and Nashville Railroad Co. v. Maxwell, 237 U.S. 94, 35 S.Ct. 494, 59 L.Ed. 853 (1915) 4, 5, 13

Louisville and Nashville Railroad Co. v. Mead Johnson and Company, 737 F.2d 683 (7th Cir.), *cert. denied*, 469 U.S. 982, 105 S.Ct. 386, 83 L.Ed.2d 320 (1984) 8

Miller v. Ideal Cement Co., 214 F.Supp. 717 (D.Wyo. 1963) 23, 24

Mohasco Industries, Inc. v. Acme Fast Freight, 491 F.2d 1082 (5th Cir. 1974) 13

Nyad Motor Freight, Inc. v. W.T. Grant Co., 486 F.2d. 1112 (2d Cir. 1973) 8

Pacific Gas and Electric Co. v. F.P.C., 506 F.2d 33 (D.C. Cir. 1974) 20

Puerto Rico Maritime Shipping Authority, et. al. v. Valley Freight Systems, Inc., 856 F.2d 546 (3rd Cir. 1988) 20

Regular Common Carrier Conference, et. al. v. United States, 793 F.2d 376 (D.C. Cir. 1986) 11, 12, 19

Southern Pacific Transportation Co. v. Commercial Metals Co., 456 U.S. 336, 102 S.Ct. 1815, 72 L.Ed.2d 114 (1982) 5, 11, 15, 23

Southern Pacific Transportation Co. v. Miller Abattoir Co., 454 F.2d 357 (3rd Cir. 1972) 8

Southern Pacific Transportation Co. v. San Antonio, Texas, 748 F.2d 266 (5th Cir. 1984) 8

TABLE OF AUTHORITIES – Continued

Page

Square D Co. and Big D Building Supply Corp. v. Niagara Frontier Tariff Bureau, et. al., 476 U.S. 409, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986) 6, 7, 21, 24, 25

Supreme Beef Processors, Inc. v. Yaquinto (In Re Caravan Refrigerated Cargo), 864 F.2d 388 (5th Cir. 1989), *Cert.* Pending, Case No. 88-1958 ..... 8, 14, 15, 16, 22

T and M Transportation Co. v. S.W. Shattuck Chemical Co., 148 F.2d 77 (10th Cir. 1945) 23

Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 103 S.Ct. 1343, 75 L.Ed.2d 260 (1983) 6

Time, Inc. v. U.S., 359 U.S., 473, 79 S.Ct. 904 (1959) 13

United States v. P. Koenig Coal Company, 270 U.S. 512 23

United States v. Western Pacific Railroad Co., 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956) 2, 10, 11, 20

Western Transportation Co. v. Wilson and Co., Inc., 682 F.2d 1227 (7th Cir. 1982) 18

STATUTES

49 U.S.C. Section 10701 ..... 7, 21

49 U.S.C. Section 10702 22

49 U.S.C. Section 10704 14

49 U.S.C. Section 10704(b)(1) 22

49 U.S.C. Section 10761(a) 1, 3

49 U.S.C. Section 10761(b) 12

TABLE OF AUTHORITIES – Continued

Page

49 U.S.C. Section 10762 ..... 1, 3

49 U.S.C. Section 11705 13

49 U.S.C. Section 11705(b)(3) 13

49 U.S.C. Section 11706(a) 21

49 U.S.C. Section 11903(a) 16, 22

OTHER AUTHORITIES

U.S. Constitution, Article I, Section 8, Clause 3. 1

Ex Parte MC-177, National Industrial Transportation League, Petition to Institute Rulemaking on Negotiating Motor Common Carrier Rates, 3 I.C.C. 2d 99 (1986) 7, 20

House Report 96-1069, 96th Cong., 2nd Sess. 12, reprinted in 1980 U.S. Code Cong. and Admin. News 2282, 2307 8

STATUTES INVOLVED

Section 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation service, or another device.

Section 10762. General tariff requirements

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle . . .

INTEREST OF THE AMICI CURIAE

Each of the following parties joins as a sponsor of the within brief as *Amicus Curiae:*

1. Robert Yaquinto, Jr., Trustee for the estate of Caravan Refrigerated Cargo ("Caravan");

2. The unsecured Creditor's Committee of Manley Truck Line, Inc., ("Manley Committee");

3. The unsecured Creditor's Committee of Campbell's Sixty-Six Express, Inc. ("Campbell Committee");

4. Fredrick M. Luper, Trustee for the estate of Lee Way Holding Company ("Lee Way").

The respective interests of the *Amici Curiae* may be stated as follows:

1. Caravan currently holds a judgment for undercharges in an amount exceeding One Hundred Thousand Dollars ($100,000.00), which judgment was unanimously affirmed by the Fifth Circuit Court of Appeals. The Defendant in that case has filed a Petition for Certiorari in this court, case number 88-1958.

2. The Manley Committee represents the unsecured creditors of the bankruptcy estate of Manley Truck Line, Inc. ("Manley"). Manley is under chapter 11 proceedings in the District of Kansas at Topeka. The creditors committee seeks to recover all assets for the estate for distribution to creditors. A large asset of Manley is the undercharge litigation now pending which includes 43 cases exceeding $380,000.00 dollars.

INTEREST OF THE AMICI CURIAE – Continued

3. The Campbell Committee represents the unsecured creditors of Campbells Sixty-Six, Inc. ("Campbell"). Campbell is currently in chapter 11 proceedings in the United States Bankruptcy Court for the Western District of Missouri. The creditors of Campbells seek to obtain distribution on their claims, through the assets of Campbells, one of which is the undercharge litigation.

4. Fredrick M. Luper, Trustee for the estate of Leeway Holding Company is a bankrupt holding company which owned two (2) operating ICC licensed motor carrier subsidiaries, Leeway Motor Freight and Commercial Lovelace Motor Freight. Leeway has substantial assets of the estate currently pending in undercharge litigation. These assets are being gathered for the use and benefit of the creditors of the Leeway estate.

Unlike the petitioner in this case, the *Amici Curiae* have generally not had their cases referred to the Interstate Commerce Commission ("ICC"). Although the arguments are similar, and the *Amici Curiae* support the position of Maislin in this cause, Maislin has a slightly different interest in that there has been a finding of certain facts by an administrative body, upon which facts the Eighth Circuit relied in its ruling. Notwithstanding that difference, these *Amici Curiae* support Maislin's position in this matter, and suggest that the Eighth Circuit erroneously ruled in favor of the shipper in that case based upon the so-called "unreasonable practices" defense.

ARGUMENT

A. Summary of Argument

These matters present a simple, straightforward negotiated rate case. Typically, the carrier quoted and billed and their customers paid sums for interstate transportation which were not in accordance with rates duly on file with the Interstate Commerce Commission ("ICC"). Congress has preempted and exclusively regulated the field of interstate commerce pursuant to United States Constitution Article I, Section 8, Clause 3. Congress has passed statutes, from time to time, relating to transportation and those are now recodified as the Interstate Commerce Act (the "Act"), Title 49 U.S.C. Sections 10101, *et. seq.* These statutes mandate that a common carrier charge and collect only the tariff rate. This long-established, well-entrenched doctrine is often referred to as the "Filed Rate Doctrine" or "Filed Tariff Doctrine". The Filed Rate Doctrine has often been recognized by this court. In 1924 this Court explained the Filed Rate Doctrine in *Louisville and Nashville Railroad Co. v. Central Iron and Coal*, 265 U.S. 59, 44 S.Ct. 441, 68 L.Ed. 900 (1924). The Filed Rate Doctrine is based upon the provisions of the Interstate Commerce Act which are now found at 49 U.S.C. 10761(a) and 10762. This court has never altered its view that the Filed Rate Doctrine compels payment of the tariff charges regardless of the carrier's actions. Likewise, the statutory foundation for the Filed Rate Doctrine has never been changed. In fact, when Congress carefully reexamined this area of the law in 1980, the Filed Rate Doctrine was reenacted as Section 10761(a).

The shipping customers ("Shippers") of the *amici curiae* rely upon the decision in *Buckeye Cellulose Corp. v. L & N Railroad Co.*, 1 I.C.C.2d 767 (1985), *Aff'd sub. nom. Seaboard System Railroad v. United States*, 794 F.2d 635 (11th Cir. 1986) (*"Seaboard"*). Shippers also assert an inconsistency with this court's ruling in *United States v. Western Pacific Railroad Co.*, 353 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956).

Seaboard is not a case of a quoted rate versus a published rate, but instead, a case of two (2) rates which were published in a tariff, but unclear to the ordinary user. Therefore, the higher rate could not be used under the rule of construction that ambiguity or unclarity in the tariff shall result in application of the lower rate.

Likewise, this court's ruling in *Western Pacific* is not inconsistent with the Filed Rate Doctrine. This court held in *Western Pacific* that the ICC's primary jurisdiction must be invoked where technical issues are involved. In *Western Pacific*, the specific commodity being shipped was not listed in any tariff. Thus, the technical expertise of the ICC was required to determine which of two similar, though not exact, commodity descriptions should apply to those shipments.

Congress mandates collection of undercharges. Shippers cannot rely on quoted rates or avoid payment by claiming unreasonable practices. Nor can the ICC authorize non-payment, since the statutory mandate binds all parties.

B. Collection of Undercharges, as Mandated by Congress, Cannot Constitute an Unreasonable Practice.

1. Statutory Foundation

Pursuant to constitutional authority, the Congress has occupied and preempted the field of interstate commerce regulation. Congress exercised its authority by passage of the Interstate Commerce Act, including Sections 10761(a) and 10762. Those sections form the foundation of the Filed Rate Doctrine. Section 10761(a) provides as follows:

> Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service is contained in a tariff that is in effect under this subchapter. *That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.* (Emphasis added.)

Section 10762 provides, in pertinent part, as follows:

> . . . A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle.

These sections and their predecessor sections, mandate that a carrier charge and collect only those amounts which are contained in the tariff. Congress made no exception, other than contract carriage.

2. Purpose of the Act

The Act is intended to prohibit any discrimination, actual or potential. *Empire Petroleum Co. v. Sinclair Pipeline Co.*, 282 F.2d 913, 916 (10th Cir. 1960). The Filed Rate Doctrine was adopted to prevent discrimination. *Louisville and Nashville Railroad Co. v. Maxwell*, 237 U.S. 94, 35 S.Ct. 494, 59 L.Ed. 853 (1915).

Shippers argue that a private, non-published rate should prevail. Shippers ignore this express purpose of the Act. Shippers want this Court to approve a private, secret rate agreement. Yet, the Act specifically prohibits such agreements. This Court should not sanction the very type of illegal, private agreement Congress forbade.

Shippers forced a carrier, now bankrupt, to accept lower rates. Shippers violated the intent of Congress. Now shippers ask for judicial approval because the carrier acted unreasonably. The unreasonable conduct, if any, was the illegal concession these large shippers extracted.

3. Authority from this Court

In *Maxwell*, this court specifically stated that "deviation from it [the tariff] is not permitted upon any pretext". 35 S.Ct. at 495. This court acknowledged that harsh results may sometimes occur, and that unfairness may seem to result, however, Congress enacted the rule of law and this court must support that rule of law.

Shippers attempt to make much of the language in *Maxwell* that the filed rate governs unless suspended or set aside. Shippers miss two (2) crucial facts. First, the pronoun "it" refers to the rate, not the practice. Shippers

do not attack the reasonableness of rate, only the reasonableness of practice. *Maxwell* recognizes the ICC's authority to adjust an unreasonably high rate, but does not sanction an illegal rate agreement. This distinction is more fully explained in Section C.1. hereinbelow.

Second, the *Maxwell* language only applies prospectively. Neither Congress nor this Court has allowed *ex post facto* changes in the filed rate. The ICC can find the rate unreasonable and require lower rates in the future. The ICC cannot arbitrarily nullify the filed rate after-the-fact.

In more recent years, this court has considered the Filed Rate Doctrine in several other contexts. For example, in *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336, 102 S.Ct. 1815, 72 L.Ed.2d 114 (1982), this court considered deviation from credit regulations as a defense to a carrier's suit for collection of its full tariff charges. This court held that *no* action on the part of the carrier could prevent collection of the tariff charges and affirmed the Filed Rate Doctrine, stating as follows:

> It is perhaps appropriate to note that a carrier has not only the right but also the duty to recover its proper charges for services performed.

102 S.Ct. at 1821. Thus, the carrier's violation of credit regulations (in effect, "unreasonable" billing practices) provided no defense to the shipper. The tariff rate must be paid. Policing the carrier through administrative, civil and/or criminal penalties may be accomplished through the ICC's administrative arm. 102 S.Ct. at 1823-4.

A year later, this court considered the Filed Rate Doctrine in a slightly different context. In *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 103 S.Ct. 1343, 75 L.Ed.2d 260 (1983), this court considered the jurisdictional foundation for an action to collect undercharges. This Court reasoned that an action to collect undercharges, being based upon the statutes previously cited herein, constitutes a federal question, and *not* a contract action. This fact is extremely important. This Court found that the charges are *not* a matter of contract, but instead, are a matter of law. Thus, collection of the tariff rate cannot be unreasonable. Indeed, it is the only lawful alternative. In other words, the tariff rate prevails over any "agreed" or "negotiated" rate.

Most recently, this court considered the Filed Rate Doctrine in the context of antitrust exemption in *Square D. Co. and Big D Building Supply Corp. v. Niagara Frontier Tariff Bureau, et. al.*, 476 U.S. 409, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986). In *Square D*, this court considered whether a collective rate bureau remains exempt from antitrust liability in light of the 1980 Amendments to the Act. After reviewing the longstanding notions of collective rate-making, non-discriminatory pricing and the Filed Rate Doctrine, this court concluded that the changes to the Act were not intended to liberalize, modify, annul, waive or in any way dilute or limit the long-standing interpretation of the law. This Court stated as follows:

> . . . it nevertheless remains true that Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme, which had been a significant part of our settled law for over half a century, and that Congress did not see fit to change it when Congress carefully reexamined this area of the law in 1980. *Petitioners have pointed to no specific statutory provision or legislative history indicating a specific Congressional intent to overturn the long-standing Keogh construction; harmony with the general legislative purpose is inadequate for that formidable task.* (emphasis added).

106 S.Ct. at 1928-29.

Shippers arguments actually conflict with this Court's ruling in *Square D*. This Court found a "statement of general legislative purpose inadequate for . . . (the) formidable task" of overruling long-settled policy. *Square D.*, 106 S.Ct. at 1928-29. Shippers arguments rely upon the ICC's self-annointed, expanded area of involvement. *See, Ex Parte MC-177 National Industrial Transportation League, Petition to Institute Rulemaking on Negotiating Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) ("*MC-177*"). That expansion relies upon nothing but a general statement of legislative purpose (49 U.S.C. 10701), and the *Seaboard* opinion. In reality, the ICC has bootstrapped its authority by choosing to declare the Filed Rate Doctrine invalid, on a case-by-case basis, pursuant to a general statement of purpose, the very activity this Court declared improper in *Square D.*

In fact, this Court's uniform interpretation of the Filed Rate Doctrine parallels Congressional intent as expressed in 1980 when the Interstate Commerce Act was revised. In debating the revisions to the Interstate Commerce Act, Congress expressed its intent as follows:

> The thrust of (the new zone of rate freedom subsection) . . . is to provide for more pricing freedom and less government regulation and to

> balance freer entry into the industry, freer expansion of the industry, and the additional competition that will result from other provisions of the bill. The concept, then, is to spur competition both in service and in pricing . . .
>
> This new latitude carries with it less government involvement, *except in the area of discriminatory and predatory pricing*. In these two areas the Commission's powers remain intact. (emphasis added).

See, House Report 96-1069, 96th Cong., 2nd Sess. 12, reprinted in 1980 U.S. Code Cong. and Admin. News 2282, 2307.

4. Courts of Appeal Decisions

The Circuit Courts of Appeal consistently followed this Court's lead in applying the Filed Rate Doctrine. *See, e.g., Supreme Beef Processors, Inc. v. Yaquinto*, 864 F.2d. 388 (5th Cir. 1989), *Cert. pending*, Case No. 88-1958; *Nyad Motor Freight, Inc. v. W.T. Grant Co.*, 486 F.2d 1112 (2nd Cir. 1973); *Southern Pacific Transportation Co. v. Miller Abattoir Co.*, 454 F.2d 357 (3rd Cir. 1972); *Illinois Central Gulf Railroad Co. v. Golden Triangle Wholesale Gas Company*, 586 F.2d 588 (5th Cir. 1978); *Southern Pacific Transportation Co. v. San Antonio, Texas*, 748 F.2d 266 (5th Cir. 1984); *Louisville and Nashville Railroad Co. v. Mead Johnson and Company*, 737 F.2d 683 (7th Cir.), *cert. denied*, 469 U.S. 982, 105 S.Ct. 386, 83 L.Ed.2d 320 (1984); *Consolidated Freightways Corp. v. Terry Tuck, Inc.*, 612 F.2d 465 (9th Cir.), *cert. denied*, 447 U.S. 907 (1980); *Empire Petroleum Co. v. Sinclair Pipeline Co.*, 282 F.2d 913 (10th Cir. 1960).

Two recent Courts of Appeal have ruled in favor of shippers, following the Eighth Circuit. *Amici Curiae* submit that those decisions, to the extent that they disallow collection of undercharges, improperly interpreted the law.

5. Seaboard Is Consistent with Amici Curiae

Shippers argue that the Eleventh Circuit ruling in *Seaboard* authorizes nonpayment due to "unreasonable practices". Shippers miss the point of *Seaboard*.

The Filed Rate Doctrine assumes that a rate is published in a tariff, which any shipper might check for its validity. This is the vehicle for providing notice. The Eleventh Circuit *explicitly* ruled in *Seaboard* that the *tariff* (*not* a quoted rate) was "not plain to the ordinary user". 794 F.2d at 637. Given this unclarity in the tariff, undercharges could not be collected for the time period during which the shipper and the carrier agreed that the lower of the two rates provided in the tariff should apply. *See*, 794 F.2d at 635 ("The controversy reflects a somewhat unclear published tariff.")

Interestingly enough, the *Seaboard* opinion does not disallow collection of the undercharges after the carrier notified the shipper that a higher rate would apply. In fact, the Eleventh Circuit affirmed a ruling in favor of the carrier for recovery of undercharges for the time period following notification that the higher rate actually applied. That decision is entirely consistent with the Filed Rate Doctrine. Once the shipper has clear notice that a higher rate was actually applicable under that tariff, the shipper had to pay the higher rate. Prior to that date, the

shipper did not have notice of the higher rate, because the tariff was "unclear".

Thus, *Seaboard* involved the application of one of two rates out of a tariff. The applicable rate could not clearly be determined. By mutual interpretation, the lower rate was used, until the carrier determined the higher rate applied. There was no unpublished, private agreement which prevailed over the filed rate. *Seaboard* did not so rule, and in fact, ruled quite to the contrary by requiring payment of the filed rate after notice was given to the shipper of a higher applicable rate.

6. Western Pacific Consistent with Amici Curiae

Shippers' reliance on *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956) is misplaced. This Court's decision in *Western Pacific* supports the Filed Rate Doctrine and its enforcement over claims of "unreasonable practices".

The doctrine of primary jurisdiction did require referral to the ICC of certain issues in *Western Pacific*. The Court there faced a commodity (steel casings with napalm gel but lacking bursters or fuses) which did not appear in any tariff. Two similar commodities did appear in tariff schedules. To determine whether the steel casings should be rated as "incendiary bombs" or "gasoline in steel casings" required a review of the underlying costs and risk allocation factors which justified each rate. 77 S.Ct. at 168. That determination was sufficiently technical to require resort to the ICC's expertise.

On the other hand, Shippers assert that a negotiated rate should prevail over an undisputed, clear tariff. This Court found primary jurisdiction applicable in *Western Pacific* based on the technical issues. Shippers raise no technical issues. These are simply cases in which the correct rate was not charged initially.

7. Other Pertinent Cases

In the *Commercial Metals* decision cited above, this court held that the "Carrier has not only the right but also the duty to recover its proper charges for services performed." 102 S.Ct. at 1982. *Amici Curiae* seek only to comply with that duty.

In *Regular Common Carrier Conference, et. al. v. United States*, 793 F.2d 376 (D.C. Cir. 1986) the D.C. Circuit found that the Filed Rate Doctrine stands supreme. Justice Scalia, author of the opinion, stated, in pertinent part, as follows:

> Even without any clear textual indication, it would be doubtful whether the waiver provision of Section 10762 could be used so expansively as to nullify this Section 10761 requirement for a "rate . . . contained in a tariff." That requirement is utterly central to the Act. Without it, for example, it would be monumentally difficult to enforce the requirement that rates be reasonable and non-discriminatory (citation omitted) and virtually impossible for the public to assert its right to challenge the lawfulness of existing or proposed rates (citation omitted). The matter is placed beyond all doubt, however, by the fact that 10761 contains its own waiver provision, authorizing the Commission

> to "grant relief from subsection (a) of this section" only "to contract carriers." (citation omitted.) That explicit limitation would be meaningless if the Commission could effectively dispense with the requirement for a "rate . . . contained in a tariff" by unlimited dilution of the "general tariff requirements" under Section 10762.

Regular Common Carrier Conference, 793 F.2d at 379.

Shippers would allow unlimited, after-the-fact dilution of the tariff filing requirements. If the ICC determines, on a case-by-case basis, that collection of the filed rate would be "unreasonable", then the requirement of a "rate . . . contained in a tariff" would be rendered meaningless.

Even more basic is the language quoted by Justice Scalia. Relief from the Filed Rate Doctrine can *only* be granted for contract carriage. 793 F.2d at 379, citing 49 U.S.C. 10761(b). Shippers seek authority for the ICC to grant *ex post facto* relief from the Filed Rate Doctrine, based on an ill-defined, subjective notion of reasonableness.

The lesson from *Regular Common Carriers* is quite simple. A negotiated rate cannot be enforced. The ICC cannot lawfully enforce a private agreement which varies from a published tariff. "Reasonability" is not material since all parties knew, or were legally held to know, the lawful rate from the start.

C. No Unreasonable Actions Involved Where Shipper Relies on Quoted Rate.

1. Rate Reasonableness vs. Practice Reasonableness

Shipper's analysis assumes that "rate unreasonableness" and "practice unreasonableness" are the same, and that primary jurisdiction covers both alike. In fact, they are different concepts with different meanings.

In the area of rate reasonableness, there is some remedy through the ICC, in the form of an action for reparations. This Court initially held that there was no right to relief based upon reasonableness. *Time, Inc. v. U.S.*, 359 U.S. 473, 79 S.Ct. 904 (1959). In response, Congress provided a limited remedy. Public law 89-170, Sections 6 and 7, 89th Congress, 1st Sess., Sept. 6, 1965, now codified at 49 U.S.C. 11705. In regard to Motor Carriers, that remedy is expressly limited only to relief for "*rates* . . . in violation of this subtitle". 49 U.S.C. 11705(b)(3) (emphasis added). An action for reparations, however, is the exclusive remedy. *Mohasco Industries, Inc. v. Acme Fast Freight*, 491 F.2d 1082, 1084 (5th Cir. 1974).

Many of the cases referred to by Shippers concern referral for determination of rate reasonableness. In fact, the *Maxwell* case specifically finds that the ICC may find a *rate* unreasonable in stating that "shippers and travelers are charged with notice of *it*, and they as well as the carrier must abide by *it* unless *it* is found by the commission to be unreasonable." (emphasis added). Grammatically speaking, the key question is the proper antecedent for the pronoun "*it*". The context of the sentence indicates that "it" refers to the filed "rate". In fact,

Congress directs the ICC to determine the reasonability of rates in 49 U.S.C. 10704, requiring the ICC to consider cost, income, depreciation and other relative factors to insure that a carrier can make an adequate profit and maintain its operation, thereby providing safe highways and safe transportation. None of those factors is at issue here. Virtually all of the cases cited by Shippers suffer from this infirmity.

2. "Unreasonable Practices" May Not Be Considered

In *Supreme Beef Processors, Inc. v. Robert Yaquinto, Trustee for Caravan Refrigerated Cargo, Inc., (In Re Caravan Refrigerated Cargo, Inc.)*, 864 F.2d 388 (5th Cir. 1989) (*"Caravan"*) the Fifth Circuit directly addressed "unreasonable practices". That case involved facts identical to those at issue here – a quoted rate versus a published rate, and the reasonableness of "practice" in collecting those rates. The United States District Court and the Fifth Circuit Court of Appeals unanimously found that no question of unreasonable practices can deter or prevent a carrier from collecting the filed rate. In fact, the Fifth Circuit specifically held as follows:

> Our decision here is an application of the same rule: A shipper that pleads unreasonableness as a defense cannot prevent enforcement of the filed tariff doctrine or force the District Court to stay proceedings and refer the case to the Commission. (Footnote omitted) Any other decision would constitute legislation on our part; it would create an exception that swallows the doctrine and thereby would vitiate a long-standing and notorious policy which Congress has visited and left intact.

Caravan, at 392.

Both federal and state law consistently hold that the established tariff is the only charge that may lawfully be charged and collected, and that any agreement to the contrary is unenforceable. *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336 (1982); *In re Penn Central Transportation Co.*, 477 F.2d 841, 844 (3rd Cir.), *aff'd in part*, 414 U.S. 885, *cert. denied in part*, 414 U.S. 923 (1973). As the Third Circuit stated in *In re Penn Central:*

> Under the Interstate Commerce Act, freight charges incurred pursuant to a filed tariff are accorded a legally superior status: that of a law. The only defense which can be raised to a carrier's suit for these legal charges is that the services have been paid for, that the services were not rendered, that the services were charged under an inapplicable tariff schedule, or that the rates were unreasonable.

477 F.2d at 844. None of these defenses has been raised in this case.

3. Shippers Cannot Rely on Quoted Rate

The argument of "unreasonable practices" fails for other reasons as well. Shippers ignore the fact that notice by tariff is the lynchpin of the Act. All shippers have constructive, if not actual, knowledge of the filed rate. The notion that it is reasonable to rely upon a rate which one knows to be wrong simply defies logic. Any reliance is not reasonable. In fact, such reliance is not even lawful,

since shipper and carrier are both subject to criminal penalties for entering into a rate agreement different than the published tariff. *See,* 49 U.S.C. 11903(a). In effect, shippers contend that a carrier's actions are unreasonable since they refuse to be bound by an illegal contract. An agreement as to rate which varies from the tariff is illegal and void *ab initio.*

4. Reliance on Quoted Rate is Unreasonable

While Shippers complain about undercharges, they fail to address the corollary – overcharges. Shippers continue to file for and receive payment of overcharges. If the shoe were on the other foot, Shippers would not be arguing for quoted rates to prevail. The carrier interests uniformly apply tariffs, whether the result is overcharge or undercharge.

As a question of "reasonableness," Shippers also ignore the actual contract between the parties. The negotiated rate precedes the shipment, which occurs by bill of lading. The bill of lading, as a contract between the parties, expressly incorporates the tariffs and classifications in effect. Thus, even if an illegal rate had been agreed, that agreement was superseded by the bill of lading contract. If shippers unilaterally ignore the bill of lading, they are not entitled to relief.

The Federal Respondent argues that unreasonable practices should be allowed as a defense because bankrupt carriers are not subject to reparations. Federal Respondent's Brief as *Amicus Curiae,* p.15, *Supreme Beef Processors, Inc. v. Robert Yaquinto, Jr., Trustee for Caravan*

Refrigerated Cargo, Inc., Cert. Pending, Case No. 88-1958. Whether a reparations award results in payment is irrelevant. There may be creditors of bankrupt carriers who have judgments for materials, services or goods, but payment of those judgments is not guaranteed. Further, this issue arises with ongoing carriers as well. Should the rule be different due to Bankruptcy? The policy of bankruptcy would dictate otherwise. The undercharges are assets of the bankruptcy estate. Their collection will benefit all creditors as contemplated by Title 11. To prefer Shippers, who engaged in an illegal agreement, over innocent creditors, certainly does not promote the purpose of fair and equitable distribution of assets to creditors of a bankruptcy estate.

5. Case Authority Explained

In *Seaboard System Railroad v. United States,* 794 F.2d 635 (11th Cir. 1986) the Court upheld an ICC determination of unreasonableness, and prevented collection of purported undercharges. As with most cases, however, the holding cannot be viewed in a vacuum but only in the context of its facts. As discussed hereinabove (Section B.5), the *Seaboard* case did not consider a quoted rate versus a published rate, but instead, it considered two published rates, application of which was unclear to the ordinary user. Under those circumstances, when the carrier and shipper agreed that the *lower, published* rate applied, the carrier was prevented from collecting the *higher, published* rate. *Seaboard* stands not for the proposition that a quoted rate may prevail, but only that where a tariff is unclear, and the shipper and carrier agree upon its application, unless and until notified of a different

interpretation, the carrier is held to its own interpretation of its own tariff.

A recent decision by the Seventh Circuit entitled *Carriers Traffic Service, Inc. et. al. v. Anderson, Clayton and Company, et. al.*, Case numbers 88-2697, 88-2707 and 88-3053 (7th Cir. 1989) (*"Anderson"*) similarly upholds the Filed Rate Doctrine. The Seventh Circuit specifically stated that the "holding here should be construed narrowly", and should be applied only to "the circumstances of these cases". Slip opinion, p. 19-20. Even without that limitation, however, *Anderson* does not authorize the use of quoted rates under the guise of "unreasonable practices" as a defense. The Seventh Circuit ruled in *Anderson*, as it did in *Western Transportation Co. v. Wilson and Co., Inc.*, 682 F.2d 1227 (7th Cir. 1982) on a "notation" tariff. Both cases concern a published rate, and not a quoted rate. *Anderson* concerned a tariff which required a notation on the bill of lading to indicate that the shipper had loaded and counted the goods on the truck. Everyone agreed that the shipper had, indeed, done exactly that. Simply because that notation had not been made on the bill of lading, however, the carrier sought collection of a higher, published rate. Again, this case concerned published rates, not a quoted rate versus a published rate. In *Anderson*, as the Court had done several years previously, the Court found that the notation requirement was for informational purposes, and where all parties agreed that the shipper had indeed loaded and counted as required by the tariff, the requirement of notation provided no useful purpose. Since no secret "deal" was involved (the tariff was published), policy does not require the absurd. *Anderson*, p. 15.

6. Contrast Shippers Situation with Cases Cited

The above two cases contrast sharply with the situation presented by Shippers. Shippers did not have a published rate upon which they sought to rely, but only a quoted rate. Shippers either did not check the tariff or, if they did, knowingly violated the law. Shippers do not seek determination as to the reasonableness of a published tariff, but the reasonableness of a quoted, unpublished rate. Nowhere did the Eleventh Circuit, Seventh Circuit or Fifth Circuit imply or allow, in any way, a quoted rate to prevail over a published rate.

As Justice Scalia said while on the D.C. Circuit Court of Appeals, the Filed Rate Doctrine is "utterly central to the Act", and therefore the ICC cannot "effectively dispense with the requirement for a "rate . . . contained in a tariff" by unlimited dilution of the "general tariff requirements under Section 10762". *RCCC*, 793 F.2d at 379.

7. "Unreasonable Practices" Constitute the Exception

Shippers suggest that the described "unreasonable practices" are rampant. The Federal Respondent cites numbers (117 referrals and 80 direct cases). How many shipments occur daily? What percentage of shipments do these constitute? Did Shippers point out that undercharge bills occur in something less than 3% of the bills of each carrier? Of course not. By exaggerating the problem, Shippers move the focus away from their own sharp practices which resulted in preferential, secret rates. Such rates are illegal. They are the very evil outlawed by the Act. Yet, Shippers now ask this Court to sanction such

rates. To do so would be unwise as policy, since Congress has declared otherwise, and legally incorrect as a matter of separation of powers.

D. ICC Has No Jurisdiction to Disallow Collection of Filed Rates.

Under the doctrine of primary jurisdiction as enunciated in *United States v. Western Pacific Railroad Co.*, 356 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956), the ICC should first review technical issues. In *Western Pacific*, the Supreme Court required the ICC to first consider which of two (2) tariff rates applied (again note the difference from this case). Only the ICC should consider whether steel casings with napalm gel but without bursters or fuses constituted "incendiary bombs" or "gasoline in steel casings". We have only a case of a quoted rate versus a published rate. Congress has expressly declared that only published rates may apply. Thus, there is no room for ICC intervention.

1. ICC Does Not Define Its Own Jurisdiction

Shippers rely heavily upon the ICC statement in *MC-177*. We must, however, recognize that the ICC's statement was nothing but a policy decision. A policy decision is merely advisory, and provides no precedential value. *Pacific Gas and Electric Co. v. F.P.C.*, 506 F.2d 33 (D.C. Cir. 1974). Further, the ICC as an administrative agency, is without jurisdiction to determine the scope of its own jurisdiction. *Puerto Rico Maritime Shipping Authority, et. al. v. Valley Freight Systems, Inc.*, 856 F.2d 546 (3rd Cir. 1988). The District Court, and by reference the Bankruptcy

Court, is vested with jurisdiction over actions to recover freight charges under 49 U.S.C. 11706(a). The argument that the ICC possesses authority to rule in a manner that a Court may not is simply unfounded. The Courts enforce the law. The ICC may only offer its expertise.

2. No Statutory Authority for Referral

Shippers argue that a general statement in the Interstate Commerce Act at Section 10701 implies that the ICC has authority to waive undercharges. Sections 10761(a) and 10701 both pre-existed the 1980 amendments, and survived those amendments without change. Since Congress is presumed to know the law, by not changing those sections, it must have intended no change. If this were unclear, this Court eliminated all doubt in *Square D Co. and Big D Building Supply Corp. v. Niagara Frontier Tariff Bureau et. al.*, 476 U.S. 409, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986). This Court considered the Interstate Commerce Act and the 1980 amendments to it. Specifically, a shipper argued that the 1980 amendments changed the entire structure of the Act (similar to Shippers arguments). The Supreme Court found that an attempt to change the law cannot be inferred from a statement of general purpose:

> It nevertheless remains true that Congress must be presumed to be cognizant of this interpretation of the statutory scheme, which had been a significant part of our settled law for over half a century and that Congress did not see fit to change it when Congress carefully reexamined this area of the law in 1980. Petitioners have pointed to no specific statutory provision or legislative history indicating a specific Congressional intent to overturn the long standing *Keogh*

Doctrine: Harmony with general legislative purpose is inadequate for that formidable task.

106 S.Ct. at 1928-29. Although the context was anti-trust treble damages, as outlawed by the *Keogh* Doctrine, the holding is applicable here. Shippers rely upon Section 10701, which is nothing but a statement of general legislative purpose, to overturn the long-standing, well-entrenched Filed Rate Doctrine. The ICC was given no specific direction to change the law. Congress has not changed the law. Therefore, it remains the same.

3. ICC May Direct Future Practices Only

The Federal Respondent concedes that the ICC may only prescribe practices of a carrier in the future. Brief of Federal Respondent as *Amicus Curiae, Supreme Beef Processors, Inc. v. Yaquinto*, p. 8, end of the first full paragraph. The statutes so limit the ICC. *See*, 49 U.S.C. 10704(b)(1). For infractions in the past, the Congress established a separate means of enforcement – civil and criminal penalties. 49 U.S.C. 11903(a) (the "Elkins Act").

Shippers reliance upon 49 U.S.C. 10704(b)(1) fails for another reason. The "practices" the ICC may prescribe under 10704(b)(1) are those carrier practices listed in 10702, which does not include misquotation or billing practice.

Recognizing that a remedy exists for past as well as future violations, any action to eliminate the Filed Tariff Doctrine could only undermine the anti-discriminatory provisions of the Act.

4. Intent of Congress Should Not be Thwarted

There is no need to rationalize the intent of Congress. Congress expressed its intent. That intent is one of anti-discrimination which is accomplished via the Filed Tariff Doctrine. In unique cases, such as the notation cases (where the notation serves no useful purpose) or where two (2) rates are published and one does not clearly apply, the ICC may determine which filed rate applies. This does not allow the ICC, however, to declare an unpublished rate as applicable. The tariff may be treated as if it is a statute, binding upon both the carrier and shipper. *A.T. & S.F. Ry. Co. v. Bouziden*, 307 F.2d 230, 234 (10th Cir. 1962); *Bernstein Brothers Pipe and Machinery Co. v. Denver and R.G.W.R. Co.*, 193 F.2d 441 (10th Cir. 1951). No oral concessions contrary to a tariff may be allowed. *United States v. P. Koenig Coal Company*, 270 U.S. 512. No oral contracts or agreements may supersede or vary the tariff. *Atchison, Topeka and S.F.Ry. Co. v. Robinson*, 233 U.S. 173 (1914); *T and M Transportation Co. v. S.W. Shattuck Chemical Co.*, 148 F.2d 77 (10th Cir. 1945). See also, *Miller v. Ideal Cement Co.*, 214 F.Supp. 717 (D.Wyo. 1963). No act or omission on the part of the carrier may estop it from collecting its full tariff charges. *Empire Petroleum Company v. Sinclair Pipeline Company*, 282 F.2d 913 (10th Cir. 1960); *Bernstein*, 193 F.2d 441. *See also, Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336, 102 S.Ct. 1815, 72 L.Ed.2d 114 (1982). The conduct of a carrier cannot prevent collection of the filed rate. *Bartlett-Collins Co. v. Surinam Nav. Co.*, 381 F.2d 546 (10th Cir. 1967). Referral to the ICC for declaration of "unreasonable practices" should not be allowed to enable a quoted,

unpublished rate to apply. The ICC's determination to that effect conflicts with express Congressional intent.

CONCLUSION

Shippers stop short of arguing, though clearly hint, that application of the Filed Rate Doctrine would be unfair. That may or may not be so, however, this court should not change the doctrine which has been so long established. It is "more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil and Gas*, 285 U.S. 393, 406, 52 S.Ct. 443, 447, 76 L.Ed. 815 (1932), quoted in *Square D*, 106 S.Ct. at 1931.

The Filed Rate Doctrine as enacted by Congress and as affirmed by this court requires the carrier to charge and collect the file rate. No more and no less may be collected. The carrier is under a legal obligation to collect that rate. *No act or omission of the carrier* (even "unreasonable practices") can stop it from collecting the full tariff charges. *Miller v. Ideal Cement Co.*, 214 F.Supp. 717, 720, (D.Wyo.1963), citing *Empire Petroleum Co. v. Sinclair Pipeline Co.*, 282 F.2d 913 (10th Cir. 1960). "No oral contracts or agreements may supersede or vary the tariff." *Miller*, 214 F.Supp. at 720, citing *A.T. & S.F. Ry Co. v. Robinson*, 233 U.S. 173, 34 S.Ct. 556, 58 L.Ed. 90 (1914). Yet Petitioner seeks to vary the charges by oral agreement, after-the-fact, under the cloak of "unreasonableness". The carefully constructed regulatory environment cannot be undermined by oral agreements. That is precisely what Shippers request. But that is precisely what Congress forbade by enacting the Filed Rate Doctrine.

"The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." *Square D*, 106 S.Ct. at 1926, quoting Brandeis, J. in *Keogh v. Chi & N.W.R. Co.*, 260 U.S. 156, 43 S. Ct. 47, 49 (1922). Shippers' assertions that various carriers all acted "unreasonably" is nothing more than an attempted assertion of a species of tort based on misrepresentation or fraud. Decades old, unwavering precedent and statute mandate that Shipper's arguments be denied and the Eighth Circuit decision be reversed.

Respectfully submitted,

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